

No. 181

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE F. W. FITCH COMPANY, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

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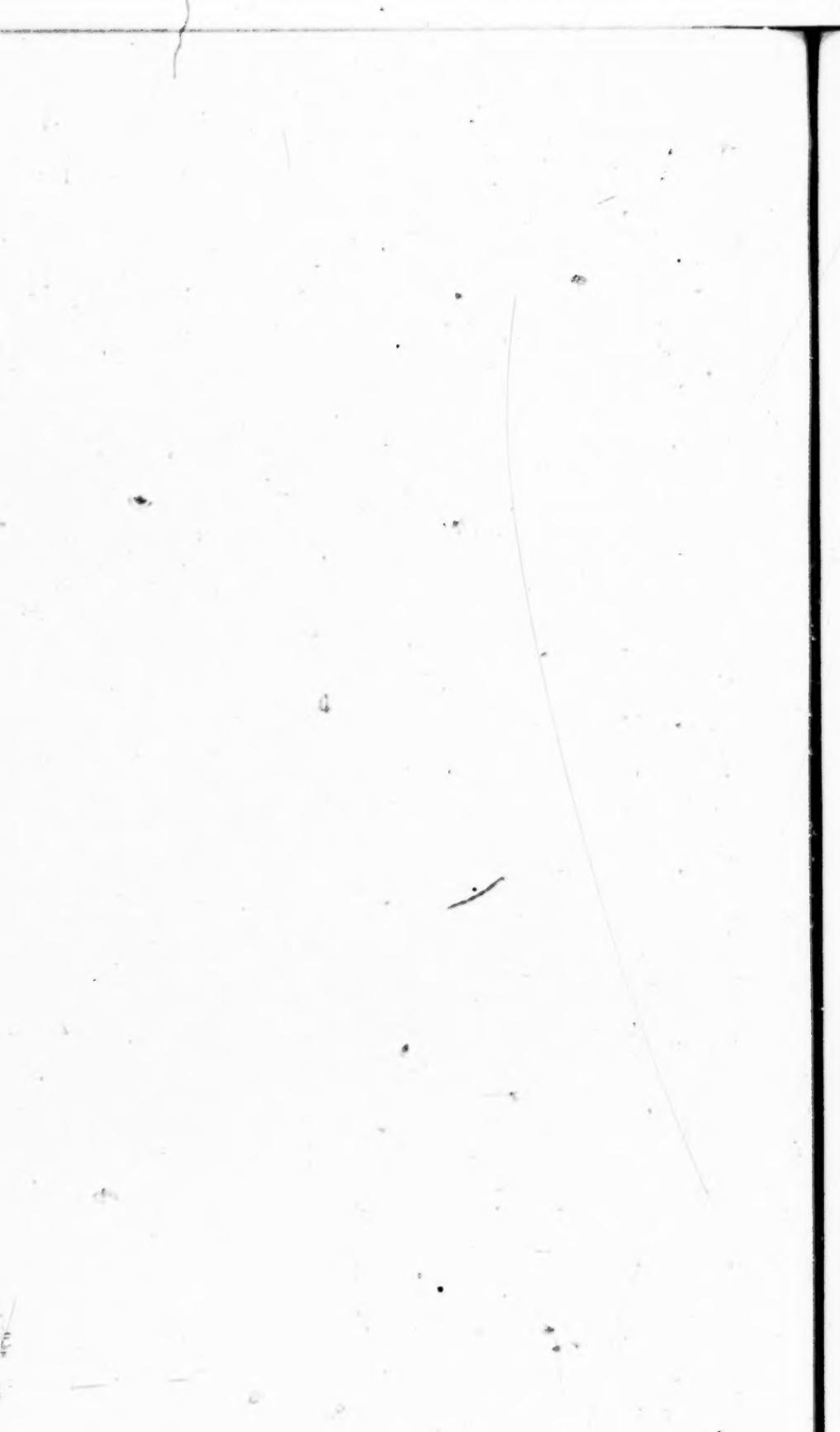
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OPINIONS BELOW

The opinion of the District Court (R. 15) is reported at 52 F. Supp. 292. The opinion of the Circuit Court of Appeals (R. 34) is reported at 141 F. (2d) 380.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 29, 1944 (R. 38). The petition for a writ of certiorari was filed on June 21, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 619 (a) of the Revenue Act of 1932 and Section 3441 (a) of the Internal Revenue Code require that a manufacturer's advertising and selling expenses be excluded from its selling prices in computing the tax imposed by Section 603 of the Revenue Act of 1932 and Section 3401 of the Internal Revenue Code.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 5-7.

STATEMENT

During the period from October 1, 1936, to June 30, 1939, the petitioner was subject to the excise tax imposed upon manufacturers of toilet articles. In computing its tax for this period the petitioner determined selling prices without excluding therefrom any amount of its advertising and selling expenses. (R. 26.) The petitioner subsequently filed a claim for refund of a portion of the tax paid on articles sold by it to certain customers, on the ground that the selling and advertising expenses attributable to those articles should have been excluded from the selling prices in computing the tax. (R. 24, 25.) The claim was rejected, and the petitioner filed suit against the United States in the District Court, which held after trial (R. 15) that such expenses should have been excluded, and that the petitioner was therefore entitled to a re-

fund of \$59,718.88 for taxes paid and not passed on. Judgment was entered accordingly (R. 28), but on appeal the Circuit Court of Appeals for the Eighth Circuit held that the exclusion was erroneous and reversed the judgment of the District Court (R. 38).

DISCUSSION

The tax involved here is measured by the prices at which the manufacturer sold the taxable articles. Section 603 of the Revenue Act of 1932 (Appendix, *infra*) ; Section 3401 of the Internal Revenue Code (Appendix, *infra*). The statute provides, however, that there should be excluded from the amount of the selling price a "transportation, delivery, insurance, installation, or other charge * * *." Section 619 (a) of the Revenue Act of 1932 (Appendix, *infra*) ; Section 3441 (a) of the Internal Revenue Code. The Circuit Court of Appeals held that this provision did not include advertising and selling expenses of the manufacturer. While we believe the decision below to be correct, we agree with the petitioner that the ruling is in conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Campana Corp. v. Harrison*, 114 F. (2d) 400, and *Campana Corp. v. Harrison*, 135 F. (2d) 334.

The importance of the question involved in this and the *Campana* cases is clear. While the effect of the exclusion provision was altered, insofar as

it applied to the excise tax on manufacturers of toilet articles, by Section 3 of the Revenue Act of 1939 (Appendix, *infra*), and the excise tax on such manufacturers was terminated as of October 1, 1941, by Section 552 (b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, there are pending, however, numerous cases in which liability for a very large total amount of tax asserted against manufacturers of toilet articles is disputed on the grounds taken by the taxpayers in these cases. Moreover, the exclusion provision is still in effect, without amendment, as Section 3441 (a) of the Internal Revenue Code, with respect to excise taxes on manufacturers of such products as automobiles, radio receiving sets, refrigerators, sporting goods, and firearms. Sections 3401-3407 of the Internal Revenue Code, as amended.

CONCLUSION

In view of the conflict of decisions, and of the manifest importance of the question involved, we do not oppose the issuance of a writ.

Respectfully submitted.

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JULY 1944.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 603. TAX ON TOILET PREPARATIONS, ETC.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum) dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

SEC. 619. SALE PRICE.

(a) In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be

excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

Internal Revenue Code:

**SEC. 3401. TAX ON TOILET PREPARATIONS,
ETC.**

There shall be imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

(26 U. S. C., Sec. 3401.)

Section 3441 (a) of the Internal Revenue Code (26 U. S. C., Sec. 3441) is substantially the same as Section 619 (a) of the Revenue Act of 1932.

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 3. TOILET PREPARATIONS TAX AMENDMENTS.

(a) Section 3401 of the Internal Revenue Code (relating to the tax on toilet preparations) is amended by inserting at the end thereof the following new paragraphs:

* * * * *

“Notwithstanding section 3441 (a), in determining, for the purpose of this section, the price for which an article is sold, whether at arm's length or not, there shall

be included any charge for coverings and containers of whatever nature, only if furnished by the actual manufacturer of the article, and any charge incident to placing the article in condition packed ready for shipment, only if performed by the actual manufacturer of the article, but there shall be excluded the amount of the tax imposed by this section, whether or not stated as a separate charge. Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, and the wholesaler's salesmen's commissions and costs and expenses of advertising and selling (not required by the foregoing sentence to be included), shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations."

(b) The amendments made by subsection (a) shall be effective only with respect to sales made after the date of the enactment of this Act.